Part 2 Contract Law CHAPTER 9 Introduction to Contracts and Agreement Page 198 CASE OPENER The Problematic Promotion Pepsi had a promotion whereby consumers were encouraged to collect Pepsi points by consuming Pepsi products. They could then redeem the points for merchandise. If they did not have quite enough points for the prize they wanted, they could buy the needed additional points for 10 cents each; however, at least 15 original Pepsi points had to accompany each order. At the climax of an early commercial for the promotion, three young boys are sitting in front of a high school building, one reading his Pepsi Stuff catalog while the others drink Pepsi, all gazing in awe at an object rushing overhead as the military march in the background builds to a crescendo. A Harrier jet swings into view and lands by the side of the school building, next to a bicycle rack. Several students run for cover, and the velocity of the wind strips one hapless faculty member down to his underwear. While the faculty member is being deprived of his dignity, the voice-over announces: “Now the more Pepsi you drink, the more great stuff you’re gonna get.” A teenager opens the cockpit of the fighter and can be seen, without a helmet, holding a Pepsi. He exclaims, “Sure beats the bus,” and chortles. The military drumroll sounds a final time, as the following words appear: “Harrier Fighter 7,000,000 Pepsi Points.” A few seconds later, the following appears in more stylized script: “Drink Pepsi —Get Stuff.” John Leonard decided to accept Pepsi’s offer of the Harrier fighter jet for 7 million Pepsi points. He quickly realized that it would be easier to raise the money to buy points than to collect the 7 million points. In early March 1996, he filled out an order form requesting the jet and submitted it to Pepsi, along with 15 Pepsi points and a check for $700,000. In response, Pepsi sent him a letter saying, “The item that you have requested is not part of the Pepsi Stuff collection. It is not included in the catalog or on the order form, and only catalog merchandise can be redeemed under this program.” John then sued for breach of contract. Did Pepsi offer to sell the Harrier jet for 7 million points? Did Leonard’s submission of the order form constitute an acceptance? Was the alleged contract in this case a bilateral or unilateral contract? Page 199 LEARNING OBJECTIVES LO 9-1 Describe what a contract is. LO 9-2 Integrate common law and UCC. LO 9-3 Distinguish between bilateral and unilateral contracts. LO 9-4 Distinguish express from implied-in-fact contracts. LO 9-5 Distinguish void, voidable, and valid contracts. LO 9-6 Distinguish executed from executory contracts. LO 9-7 Identify elements of a valid offer and a valid acceptance. LO 9-8 Explain how an offer may terminate.

The Definition of a Contract LO 9-1 Describe what a contract is. This part of the text focuses on contracts. A contract, according to the Restatement (Second) of Contracts, is “a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law in some way recognizes a duty.”1 Another, perhaps simpler, way to think of a contract is that it is a set of legally enforceable promises. Elements of a Contract A contract has four elements: the agreement, the consideration, contractual capacity, and a legal object. The agreement consists of an offer by one party, called the offeror, to enter into a contract, and an acceptance of the terms of the offer by the other party, called the offeree. The agreement is discussed in more detail in the latter part of this chapter. The second element of a contract is the consideration, which is defined as the bargained-for exchange. Another way to think of the consideration is that it is what each party gets in exchange for his or her promise under the contract. Consideration is further discussed in Chapter 10. The third element is contractual capacity, the legal ability to enter into a binding agreement. Most adults over the age of majority have the legal ability to enter into binding contracts, but Chapter 10 explains when people have either limited or no capacity to enter into these agreements. Persons who do not have the capacity to enter into legally binding contracts include those who are under the age of majority, intoxicated, or suffering from mental illness. Chapter 10 also discusses the fourth element of a binding, legal contract: legal object. The contract cannot be either illegal or against public policy. The elements of a contract, as well as defenses to its enforcement, are listed in Exhibit 9-1. Exhibit 9-1A Valid Contract Has Four Elements, and No Defenses Can Be Raised against It ELEMENTS OF A CONTRACT DEFENSES TO A CONTRACT Agreement Lack of genuine assent Consideration Lack of proper form Legal purpose Capacity Page 200 Defenses to the Enforcement of a Contract Sometimes the parties may enter into what appears to be a legally binding and enforceable contract because all four elements of a contract are present, but one of the parties may have a defense to the contract’s enforcement. Such defenses fall into two categories. The first, discussed in Chapter 12, is a lack of genuine assent. A contract is supposed to be entered into freely by both parties, but sometimes the offeror secures the acceptance of the agreement through improper means, such as fraud, duress, undue influence, or misrepresentation. In these situations, there really is no genuine assent to the contract, and the offeree may be able to raise the lack of genuine assent as a defense to enforcement of the agreement. The second defense, discussed in Chapter 13, is that the contract lacks the proper form, which typically means it lacks a writing. Certain contracts require a writing, and if

there is none, the agreement will not be enforced. Chapter 14 discusses the performance and discharge of contracts as well as remedies arising when a contract is breached.

Sources of Contract Law LO 9-2 Integrate common law and UCC. There are two primary sources of contract law: case law and the Uniform Commercial Code (UCC). A third source of law, which has become more important with increasing globalization, is the Convention on Contracts for International Sales of Goods (CISG). Chapters 9 through 14 of this book focus primarily on the law of contracts as established by the common law, and Chapters 15 and 16 focus on the law as established by the UCC and CSIG. Common Law Today's law of contracts actually originated in judicial decisions in England, which were followed by the early courts in the United States. Since then, contract law has been modified by our legislatures and by rulings of our courts. The law of contracts is primarily common law, so to find out what the law is, one could go to the Reporters and read the decisions, but an easier way to know the law would be to go to the Restatement (Second) of the Law of Contracts. Prominent legal scholars, recruited by the American Law Institute, organized the principles of the common law of contracts into the original Restatement of the Law, Contracts. The compilation has subsequently been revised and published as Restatement of the Law Second, Contracts. The Restatement (Second) is not actually the law itself, although judges frequently cite it in cases because it is an authoritative statement of what the law is. As the common law of contracts evolved in the various states, not all states interpreted all aspects of the law in the same way, so although we can generalize about the law of contracts, one would of course always want to know exactly what the law at issue is in one's own state. In the Restatement (Second), the drafters often explain what the law about a particular matter is in the majority of states and then provide alternative approaches that other states have adopted. Uniform Commercial Code Having different laws governing contracts in different states did not make interstate commerce flow smoothly. To remedy some of the difficulties created by a patchwork of different laws governing commercial transactions, the National Conference of Commissioners on Uniform State Laws and the American Law Institute drafted a set of commercial laws that could be applicable to all states. This effort was called the Uniform Commercial Code (UCC). The UCC became law in each state that adopted it completely or partially as part of its state code. Thus, for example, if a firm enters into a contract governed by the Uniform Commercial Code in Ohio, it would be

operating under the Ohio Uniform Commercial Code. GLOBAL Context Digital Archive Japan/Alamy Stock Photo Contract Law in the European Union If you are doing business with a member state of the European Union, there is one source to turn to in order to understand how the various member states regulate contracts, and that is the Principles of European Contract Law. The principles were drafted by an independent body of experts from each member state of the European Union under a project supported by the European Commission. The principles are stated in the form of articles with a detailed commentary explaining the purpose and operation of each article. Comments to each article provide illustrations, short cases that show how the rules are to operate in practice. Each article also has comparative notes surveying the national laws and other international provisions on the topic. The part of the Uniform Commercial Code that is relevant to contracts is Article 2, which governs contracts for the sale (exchange for a price) of goods (tangible, movable objects). This part of the book will sometimes point out important differences between the UCC and the common law, but the UCC is discussed primarily in Chapters 15 and 16.

Classification of Contracts LO 9-3 Distinguish between bilateral and unilateral contracts. Contracts are classified in a number of ways. Different classifications are useful for different purposes, as the following discussion demonstrates. This section will discuss some of the most useful ways contracts can be classified. Bilateral versus Unilateral Contracts All contracts can be classified as either bilateral or unilateral. Knowing whether a contract is bilateral or unilateral is important because that classification determines when the offeree is legally bound to perform. Whether a contract is bilateral or unilateral depends on what response the offeror (the party proposing the contract) expects from the offeree (the person agreeing to or accepting the contract). If the offeror wants a promise from the offeree to form a binding contract, the contract is a bilateral contract. A bilateral contract is commonly defined as a promise in exchange for a promise. As soon as the promises are exchanged, a contract is formed and the parties’s legal obligations arise. For example, when Shannon promises to pay Gary $1,000 in exchange for his promise to paint her car on July 1, they have a bilateral contract. If either party fails to perform, the other may sue for breach. In a unilateral contract, the offeror wants a performance to form the contract. The offeror wants the offeree to do something, not promise to do something. The most common unilateral offer is a reward. If Jim loses his dog, he may post a sign stating “$50 reward for the safe return of my poodle, Frenchie.” If Rita calls Jim and

says, “Don’t worry, I’ll find your dog,” she is not making a contract because the unilateral offer calls for an action, not a promise. Once she finds Frenchie and takes the dog to Jim, a contract is formed and Jim must pay. Just as the offeree is under no obligation actually to do the act called for by the offeror, the offeror may revoke the offer at any time before performance. However, to prevent injustice, once an offeree begins performance, the offeror must hold the offer open for a reasonable time to allow the offeree to complete the performance. In the Case Opener, the plaintiff would argue that Pepsi appeared to be making an offer for a unilateral contract. In its television commercial, Pepsi promised to provide a prize for a performance, the presentation of a set number of points. By submitting the requisite number of points, the plaintiff believed he was accepting a unilateral offer. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Recall that in the Case Opener, PepsiCo required contestants first to mail in Pepsi points before the company would mail the contestant a prize. But what if the Pepsi points contract required only a promise from contestants to send in Pepsi points on a certain date and PepsiCo would send the prize up front? Would the second scenario be a unilateral or a bilateral contract? Page 202 Express versus Implied-in-Fact Contracts LO 9-4 Distinguish express from implied-in-fact contracts. Contracts are classified as express or implied, depending on how they are created. The terms in express contracts are clearly set forth in either written or spoken words. The contract in the Case Opener was an express contract; the terms were set forth in the ad and the catalog. Implied contracts, in contrast, arise not from words but from the conduct of the parties. For instance, when you have a dental emergency and your dentist pulls your severely infected tooth without prior negotiation about payment, or even any mention of payment, you have an implied contract for payment for his services. As a general rule, three conditions must be met for the courts to find an implied, or as it is sometimes called, an implied-in-fact contract. First, the plaintiff provided some property or service to the defendant. Second, the plaintiff expected to be paid for such property or service and a reasonable person in the position of the defendant would have expected to pay for such property or services. Third, the defendant had an opportunity to reject the property or services but did not. In Case 9-1, the Court had to decide whether the facts gave rise to an implied-in-fact contract. CASE 9-1 TRAPANI CONST. v. ELLIOTT GROUP INC. Appellate Court of Illinois, First Division 64 N.E, 3d 132 (1016) FACTS: In February 2007, The Elliot Group, Inc., an Illinois real estate developer, made a deal with the Village of Arlington Heights to develop property in that village. Arlington Market, LLC, was subsequently formed by The Elliot Group to develop,

manage, and sell the property, a common practice in the residential development industry. Since Arlington Market had no employees, members of the Elliot Group instead managed the LLC. In March 2007, the Trapani Construction Company sent a proposal to The Elliot Group to provide construction services for the Arlington property. Trapani had previously performed work for The Elliot Group. Between March and July of 2007, Trapani sent a total of five draft contracts to the Elliot Group in which the Elliot Group was listed as the contracting party. Although none of the draft contracts were ever signed, Trapani began construction at the Arlington site in early July. The case in question arose after Trapani finished its work at the Arlington site in accordance with the terms of the draft contract and sought payment. Despite having paid Trapani for previous payment requests on the Arlington project, The Elliot Group did not pay the final invoice. Trapani sued for breach of implied-in-fact contract, and The Elliot Group asserted that there was no contract between them and the plaintiff. The trial court ruled in favor of Trapani and The Elliot Group appealed. QUESTION: Was there an enforceable implied-in-fact contract between Trapai and the Elliott Group? REASONING: The Elliot Group argued that, first and foremost, there was no contract between it and Trapani because Elliot never actually accepted Trapani's offer. The court pointed out, however, that an implied contract based on the parties' actions can exist even without clear acceptance. Implied contracts are true, binding contracts that contain the typical elements of offer, acceptance, and consideration. Upon examination of the facts, the court found that all these elements existed. First, an offer existed on the part of Trapani. Trapani often used unsigned draft contracts when working with The Elliot Group. In this case, Trapani negotiated several drafts and proposals with The Elliot Group before and during the project. Second, consideration was provided by both parties. Not only did Trapani provide The Elliot Group with several different construction services during this project, but The Elliot Group even paid for most of the project before suddenly stopping and claiming that no contract existed. Third, acceptance was apparent regardless of The Elliot Group's claims. Trapani accepted The Elliot Group's terms when they began work on the project. The Elliot Group, despite its arguments, accepted the contract when it refused to reject Trapani's work while being fully aware it was taking place (and even paying for the majority of it). Being that the three elements of a contract existed, and especially because of The Elliot Group's unwillingness to cease Trapani's work, the court ruled that an implied contract existed between the parties and that The Elliot Group is liable for the costs of the project. DECISION: The Court of Appeals agreed with the lower court that there was in fact an

implied contract between the parties, and affirmed the decision in favor of plaintiff Tripani. SIGNIFICANCE: This case clearly outlines the requirements for an implied-in-fact contract and shows that contracts can still exist in the absence of a signed, written contract. CRITICAL THINKING Although in this case, it may seem obvious that facts and circumstances point to the mutual intent to contract, what kind of situations would this be less clear? What kind of evidence would be sufficient, and what kind of evidence would merely be necessary to show the mutual intent to contract needed to show an implied-in-fact contract? ETHICAL DECISION MAKING Which stakeholders' interests are helped by this decision? Which stakeholders' interests are harmed? Page 203 Valid, Void, Voidable, and Unenforceable Contracts LO 9-5 Distinguish void, voidable, and valid contracts. What everyone hopes to enter into, of course, is a valid contract. A valid contract is one that contains all the legal elements of a contract as set forth in Exhibit 9-1. As a general rule, a valid contract is one that will be enforced. However, sometimes a contract may be valid yet unenforceable. A valid contract may be unenforceable when some law prohibits the courts from enforcing it. For example, the statute of frauds, discussed in Chapter 13, requires certain contracts to be evidenced by a writing before they can be enforced. Similarly, the statute of limitations mandates that an action for breach of contract must be brought within a set period of time, thereby limiting the enforceability of the contract. A void contract is, in effect, not a contract at all. Either its object is illegal or it has some defect that is so serious that it is not a contract. If you entered into a contract with an assassin to kill your business law professor, that would be a void contract because it is obviously illegal to carry out the terms of the agreement. A contract is voidable if one or both of the parties can either withdraw from the contract or enforce it. If the parties discover that the contract is voidable after one or both have partially performed, and one party chooses to terminate the contract, both parties must return anything they had already exchanged under the agreement so that they will be returned to the condition they were in at the time they entered into the agreement. Certain types of errors in the formation of a contract lead to it being voidable. Typically, the person who can void the contract is the person whom the court is attempting to protect or the party the court believes might be taken advantage of by the other party. For example, contracts by minors are usually voidable by the minor, as discussed in Chapter 11. Contracts entered into as a result of fraud, duress, or undue influence—a problem with the validity of the acceptance, as described in Chapter 12—may be voided by the innocent party. Executed Versus Executory Contracts LO 9-6 Distinguish executed from executory contracts. Once all the terms of the

contract have been fully performed, the contract is said to have been executed. As long as some of the duties under the contract have not yet been performed, the contract is considered executory. For example, if Randolph hires Carmine to paint his garage on Saturday for $800, with $200 paid as a down payment and the balance due on completion of the job, the contract becomes executory as soon as the agreement is reached. When the down payment has been made and the painting is halfway completed, the contract is still executory. Once the painting has been finished and the final payment made, the contract is an executed contract.

The Agreement LO 9-7 Identify elements of a valid offer and a valid acceptance. The first element of a contract is the agreement. As noted earlier, this chapter focuses on contracts governed by common law, that is, contracts other than those for the sale of goods. Under the common law, the agreement begins when one party, the offeror, makes an offer to another party, the offeree. Exhibit 9-2The Formation of a Contract This exhibit illustrates the first element of the contract, the agreement. For a contract to exist, the parties also must have legal capacity to enter into a contract, exchange valid consideration, and be entering into a contract with a legal purpose. The contract is formed as soon as the second party makes his or her promise. GLOBAL Context Saudi Arabian Flag Offers and Acceptances in Saudi America In most common law countries, including the U.S., advertisements, displays of goods, and so on are considered invitations to buyers to make an offer. Under Saudi Arabia’s version of Sharia law, however, advertising a good or a price is considered a binding offer (Ijab) by the seller that is accepted by a buyer. Thus, sellers are required to state their offers in the past tense (i.e., “I am selling this car for $5,000” becomes “I sold this car for $5,000”) to demonstrate that, in the mind of the seller, the price is already set and the product is as good as sold. Once a buyer accepts the offer, the seller has no right to revoke the offer. Saudi law also requires agreement and acceptance to all parts of a contract to be completed all at once. If any part of a contract is not accepted during the first negotiation, the entire contract is invalid. This stipulation comes from rule of Sharia law that forbids gharar, or uncertainty, in contracts.

Elements of the Offer An offer has three elements. Under the common law, these elements are intent, definite and certain terms, and communication to the offeree. Intent Page 205 The first element of the offer is intent. The

offeror must manifest an intent to be bound by the offeree's acceptance. Contracts are interpreted using an objective standard, meaning that the courts are concerned with only the party's outward manifestations of his or her intent, not what is going on in that party's mind. The courts interpret the words and actions of the parties the way a reasonable person would interpret them. Thus, if an individual is clearly joking or speaking out in anger, the reasonable person would not think that the individual seriously intended to make an offer, and the courts would consequently not treat the words as an offer. If someone attempts to accept such an offer, the courts will not find that a contract has been made. Sometimes an offeror may try to avoid a contract by later claiming that he was only joking when he made the offer, but the courts are not interested in one's hidden intent. As Case 9-2 demonstrates, if you joke too well, you may find yourself in an unwanted contract. CASE 9-2 LUCY v. ZEHMER Supreme Court of Virginia 196 Va. 493, 84 S.E.2d 516 (1954) FACTS: Plaintiffs W. O. and J. C. Lucy had wanted to purchase Ferguson Farm from the Zehmers for at least eight years. One night, Lucy stopped by the establishment the Zehmers operated and said that he bet Zehmer wouldn't accept $50,000 for the place. Zehmer replied that he would, but he bet that Lucy would not pay $50,000 for it. Over the course of the evening, the parties drank whiskey and engaged in casual conversation, with the talk repeatedly returning to the sale of Ferguson Farm. Eventually Lucy got Zehmer to draw up a contract for the sale of the farm for $50,000. When Lucy later attempted to enforce the agreement, Zehmer refused to complete the sale, arguing that he had been drunk and that the agreement to sell the property had been made in jest. Lucy sued to enforce the agreement. ISSUE: Had Lucy and Zehmer entered into a legally binding agreement? REASONING: The mental assent of the parties is not a requirement for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, that party's undisclosed intention is immaterial unless the other party somehow knows that the party does not mean what his words and actions would clearly indicate to any reasonable observer. In this case, not only did Lucy believe that Zehmer was serious when he drew up the contract, but there was no evidence to indicate that any action taken by Zehmer would have indicated that he was not serious. When Zehmer asked his wife to sign the writing that he drew up containing the terms of the sale, he whispered to her that he was joking, but whispered so quietly that Lucy could not and did not hear it. What happened appeared to be a good-faith offer and a good-faith acceptance, followed by the execution and apparent delivery of a written contract. Therefore, the parties would be held to their outward manifestations of entering into a

binding agreement. DECISION AND REMEDY: The parties had entered into a binding agreement, and the court enforced the agreement. SIGNIFICANCE OF THE CASE: This case demonstrates that the courts look at the circumstances surrounding the alleged making of a contract and focus on the outward manifestations of a person's intent. It clearly sends the message that people need to be careful when joking about entering into a contract because a person who jokes too well might find herself or himself bound to an agreement that she or he did not really want to make. CRITICAL THINKING Why must a joke be visibly a joke to a reasonable observer for there to be no acceptance? ETHICAL DECISION MAKING What stakeholders are being protected by the reasoning that supports the rule the court applied in this case? Page 206 BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Recall that in the case opener, the Pepsi commercial shows a fighter jet jokingly dropping a boy off at school. But what if the Pepsi commercial featured a man fully capable of owning and operating a fighter jet who turned in an appropriate and realistic number of number of Pepsi points, and Pepsi Company officials subsequently handed him the keys and deeds to such a prize? What if the commercial announcer also turned to the audience and seriously announced that such a prize was included in their prize catalog and could be theirs? Do both scenarios constitute a realistic offer, neither scenario, or only the second scenario? Preliminary Negotiations An invitation to negotiate or an expression of possible interest in an exchange is not an offer. For example, if Rachael asked Bill whether he would sell his car for $5,000, she is not making an offer; she is just inquiring about his potential willingness to sell. Likewise, when a firm or government entity requests bids for a construction project, the request is just an invitation for contractors to make offers. Thus the bids would be the offers. Advertisements Another illustration of the invitation to make an offer is the advertisement. If a custom furniture maker places an advertisement in the paper that reads, "Old-fashioned, hand-crafted cedar rocking chairs only $250 the first week in May," the store is merely inviting potential customers to come to the store and offer $250 for a rocker. Because no reasonable person would expect the store to be able to sell a rocking chair to every person who might see the ad, the court would interpret the intent of the store as being to invite readers to make an offer. Under limited circumstances, however, an ad can be treated as an offer. If it appears from the wording of the ad that the store did in fact intend to make an offer, the courts will treat it as an offer. In general, when the ad specifies a limited quantity and provides a specific means by which the offer can be accepted, the courts will treat the ad as an offer, as demonstrated by the Case Nugget

that follows. The plaintiff in the Case Opener tried to rely on the Lefkowitz case to argue that the Pepsi commercial was an offer because it was “clear, definite, explicit and left nothing to negotiation.” After all, the commercial clearly stated that 7 million points earned a Harrier jet, and the catalog provided an additional means of buying the points for cash. The court in that case, however, found that the commercial could not be regarded as sufficiently definite because it specifically reserved the details of the offer to a separate writing, the catalog. Also, the commercial itself made no mention of the steps a potential offeree would be required to take to accept the alleged offer of a Harrier jet. Page 207 The court further found that the only offer in this scenario was the plaintiff’s letter of March 27, 1996, along with the order form and the appropriate number of Pepsi points. Because Pepsi rejected this offer with its letter, there was no contract. To prevent possible bait-and-switch advertising, some states have consumer protection laws requiring advertisers to state in their ads either that quantities of the item are limited to the first X number of people or that rain checks will be available if the item sells out. CASE Nugget When Is an Ad an Offer? Lefkowitz v. Great Minneapolis Surplus Store, Inc. Supreme Court of Minnesota 251 Minn. 188, 86 N.W.2d 689 (1957) In this case, the defendant had published a newspaper announcement stating: “Saturday 9 AM Sharp, 3 Brand New Fur Coats, Worth up to $1,000.00, First Come First Served $1 Each.” Morris Lefkowitz arrived at the store, dollar in hand, but was informed that under the defendant’s house rules the offer was open to ladies but not gentlemen. The court ruled that because the plaintiff had fulfilled all the terms of the advertisement and the advertisement was specific and left nothing open for negotiation, a contract had been formed. From this case came the often-quoted exception to the rule that advertisements do not create any power of acceptance in potential offerees: an advertisement that is “clear, definite, and explicit, and leaves nothing open for negotiation.” In that circumstance, “it constitutes an offer, acceptance of which will complete the contract.” Auctions Another situation in which what seems to be an offer may not be is the auction. When a person places a good with an auctioneer for sale by auction, is the seller making an offer or is the bidder? The answer depends on what kind of auction is taking place. If nothing is stated to the contrary in the terms of the auction, an auction is presumed to be with reserve. In an auction with reserve, the seller is merely expressing an intent to receive offers. The auctioneer may withdraw the item from auction at any time before the auctioneer’s hammer falls, signaling the acceptance of the bid. Similarly, at any time before the hammer falls, the bidder may also revoke the bid. In an auction without reserve, the seller is treated as making

an offer to accept the highest bid. Thus, the seller must accept the highest bid. Not surprisingly, very few auctions are without reserve. Definite and Certain Terms Under the common law, the terms of the offer must be definite and certain. In other words, all the material terms must be included. The material terms are those terms that allow a court to determine what the damages are in the event that one of the parties breaches the contract. Sometimes an offer contains not the material term itself but a method for determining the term. For example, Guy's Sailboats is building Sara a sailboat, and the parties want to make it possible for her to pay one-third of the price of the boat in advance, one-third on delivery, and one-third in 12 monthly payments, with interest, beginning a month after delivery. Rather than stipulating an interest rate to be charged on the monthly payments, the contract might specify an external standard according to which the interest rate would be set through the course of the 12-month payment period. Page 208 The question of whether the terms of an alleged offer were adequate for the formation of a valid contract often arises in cases when one party believes that a contract had been formed and the other believes that there had been no contract because the terms of the alleged offer were not definite enough. It is therefore really important when drafting a contract to ensure that all the terms are included and clearly stated. Communication to the Offeree The offer must be communicated to the offeree or to the offeree's agent. Only the offeree to whom the offer was directed can accept the offer. If Bill overhears Sam offer to sell his car to Helen for $5,000, he cannot walk over and form a contract by accepting the offer. If he says to Sam, "I'll give you $5,000 for your car," he is not accepting the offer but, rather, is making a new offer.

Termination of the Offer LO 9-8 Explain how an offer may terminate. At some point in time, offers terminate; when an offer terminates, it can no longer be accepted to form a binding contract. There are five ways to terminate an offer: revocation by the offeror, rejection by the offeree, death or incapacity of the offeror, destruction or subsequent illegality of the subject matter of the offer, and lapse of time or failure of other conditions stated in the offer. Revocation by the Offeror The offeror is said to be the master of his offer and, as such, can revoke it at any time, even if he says he will hold the offer open for a stated period of time. If Jim sends Carol a letter offering to mow her yard every week during the summer for the price of $20 a week as long as she responds to his offer within the next month, he can still change his mind and tell her at any time before she responds that he is no longer

interested in working for her, thereby revoking his offer. If a person wishes to ensure that an offer will in fact be held open for a set period of time, the person may do so by entering into an option contract with the offeror. An option contract is an agreement whereby the offeree gives the offeror a piece of consideration in exchange for the offeror’s agreement to hold the offer open for the specified period of time. There are a number of situations when you might want to enter into an option contract. For example, if the person who made the offer is ill, and you are afraid he or she might die, you would want to enter into an option contract because you would then still have the time of the option to enter into the contract with the estate of the offeror; otherwise, the offer dies with the offeror. You might also want to enter into an option contract if you really want the object of the offer but need time to make sure you can finance it, and you do not want the offeror to sell the item to another party. For example, if the offeror offers to sell you a valuable antique car, but you are not sure you can afford the financing, you might want to get an option contract to give you time to secure financing. There is no requirement as to the value of the consideration. If the consideration is money, the parties may agree that if the offer is eventually accepted and a contract is formed, the consideration for the option contract will become part of the payment for the contract. This situation frequently arises in contracts involving real estate. Jones may be considering opening a restaurant and would like to have the option of purchasing a lot owned by Smith, so he gives Smith $1,000 for a 30-day option to purchase the lot, with the provision that the $1,000 will be deducted from the purchase price if Jones purchases the property. In the event that Jones does not buy the property, Smith will keep the $1,000. The UCC imposes an additional limitation on the offeror’s ability to revoke the offer. A promise to hold an offer for the sale of a good open for a specified period cannot be revoked if it is made in writing and signed by a merchant. As a general rule, the revocation of an offer is effective when it is received by the offeree. Because of this rule, if it is really important to the offeror to know that his offer has been revoked, he should personally deliver the revocation to the offeree. Page 209 Rejection by the Offeree The second means by which an offer can be terminated is rejection by the offeree. Regardless of how long the offer was stated to be open, once the offeree rejects it, it is terminated. In our earlier example, if Carol calls Jim and says that she is not interested in his working for her this summer or any summer because of the poor quality of the work he has done for her in the past but then calls him back an hour later to say that she has changed her mind and would like to hire him in accordance with his proposed terms, it is too late. There is no offer for her to

accept because her rejection terminated the offer. Death or Incapacity of the Offeror The offer terminates immediately if the offeror dies or loses the legal capacity to enter into the contract. This termination occurs even if the offeree does not know of the terminating event. The exception to this rule occurs when the parties had already entered into an option contract to hold the offer open for a set period of time. If an option contract exists, the administrator of the offeror's estate or the guardian of the offeror must hold the offer open until it expires in accordance with the option contract. Destruction or Subsequent Illegality of the Subject Matter If the subject matter of the offer is destroyed or becomes illegal, the offer immediately terminates. For example, if Jamie offers Bill a job managing the riverboat casino he plans to open on January 1, but, before Bill accepts the offer, the state decides to no longer allow riverboat casinos to operate in the state, the offer of employment terminates. Lapse of Time or Failure of Another Condition Specified in the Offer As noted earlier, the offeror has the power to revoke the offer at any time, even if the offer states that it will be held open a set amount of time. But if the offer states that it will be held open for only a certain time, the offer will terminate when that time expires. In the absence of a time condition in the offer, the offer will expire after the lapse of a reasonable amount of time. What constitutes a reasonable amount of time varies, depending on the subject matter of the offer. For example, an offer by a retailer to purchase seasonal goods from a wholesaler would lapse before an offer to purchase goods that could be easily sold all year long. CASE Nugget Details in the Offer Matter Lee v. Chemielewski 290 So.3d 5411 (Fla. Dist. Ct. App. 2019) Litigation stemming from a car accident led to a jury awarding the plaintiff over $14 million in damages. The defendant appealed, arguing that he had already accepted the plaintiff's previous settlement offer of $10,000. Though the defendant had raised this issue, the trial court had denied it. The plaintiff naturally contended that though his counsel did send the settlement offer, it had expired by the time defendant had accepted. The offer stated in part, "This offer will remain open for fourteen (14) days from the date of this letter, after which it will be withdrawn without further notice." Plaintiff's counsel had made the offer on November 26, and the defendant, represented by Geico, responded fourteen days later, on December 10. On that day, Geico had faxed an acceptance letter at 5:42 p.m. and then sent a representative with the $10,000 check who arrived at the plaintiff's counsel's office between 7:00 to 7:15 p.m. that evening. At issue was whether the fourteenth day expired at 5:00 p.m., the end of the business day, or midnight. The court first determined whether Geico 's actions were within the timing of the offer. It reasoned that the plaintiff's

offer did not indicate an expiration time on the fourteenth day and stated, "we cannot read such a limitation into the offer." Accordingly, Geico took action while the offer was available. The next question was whether Geico 's actions constituted acceptance. The court ruled that the settlement offer was a bilateral contract, and GEICO only needed to promise payment to accept the offer, which it did by faxing the letter at 5:42 p.m. on the fourteenth day. Even if the settlement offer was a unilateral contract, the court reasoned that Geico had accepted the offer by trying to deliver the $10,000 check. In the end, the appellate court held that the trial judge erred in determining that the defendant had failed to accept the settlement offer. The $14 million jury verdict was reversed.

Elements of the Acceptance Once an offer has been made, the offeree has the power to accept that offer and form a contract. In examining the acceptance under the common law, the basic requirements for a valid acceptance parallel those for a valid offer. There should be a manifestation of intent to be bound by the acceptance to the contract, agreement to the definite and certain terms of the offer, and communication to the offeror. Manifestation of Intent to be Bound to the Contract In general, there are two ways an offeree can manifest her or his intent to enter into the contract: by performance or by a return promise. The offeree must either do something or say something to form the contract. Recall the distinction between a bilateral contract and a unilateral contract. If the offer is for a unilateral contract, the offeree can accept only by providing the requested performance. If Bill offered to pay $500 to anyone who returned his lost dog to him, Mary could accept the offer only by returning the dog. Bill did not want her promise, and if she called and promised to return the dog to him, that promise would have no legal effect because the only way to accept a unilateral offer is by performance. With a bilateral contract, what the offeror wants to form the contract is not performance but, rather, a return promise. Sometimes, however, it is not clear whether the offeror wants performance or a return promise. In such a case, the offeree has the option of either performing or making a return promise. Silence as a Form of Acceptance Silence, as a general rule, cannot be used to form a contract. For example, Lisa and Marie both work at a local diner where the manager is very flexible and lets the waitresses trade shifts. Marie calls Lisa and leaves her a voice-mail message saying, “I can’t work my three night shifts this week. If you can cover them for me, I’ll pay you an extra $40 on top of the money you’ll receive from the boss for working my shifts. If I don’t hear from you by 7 p.m. tomorrow, I’ll

assume we have a deal and you will work for me. Thanks so much!” If Lisa does not call back, no contract has been formed because silence under these circumstances would not constitute an acceptance. Page 211 The Restatement of Contracts, however, offers three circumstances under which silence can be an acceptance. First, the offeree receives the benefits of the offered services with reasonable opportunity to reject them and knowledge that some form of compensation is expected, yet the offeree remains silent. Second, the offeror tells the offeree that silence or inaction will constitute an acceptance, and the offeree, by remaining silent, intends to accept. Third, the parties, by their previous course of dealing with each other, have established a pattern of behavior whereby it would be reasonable to assume that silence was intended to communicate acceptance. For example, a wholesaler and retailer have a long-standing relationship in which the wholesaler routinely ships a certain type of merchandise to the retailer, who rejects a shipment if it does not meet his needs. After such a pattern of behavior has been established, it is reasonable for the wholesaler to assume that when a shipment is not sent back, the retailer means to accept it. Acceptance of definite and Certain Terms: The Mirror-Image Rule When a bilateral contract is being formed under the common law, the mirror-image rule applies to the acceptance. The mirror-image rule says that the terms of the acceptance must mirror the terms of the offer. If the terms of the acceptance do not mirror the terms of the offer, no contract is formed. Instead, the attempted acceptance is a counteroffer. The following case provides an illustration of how the mirror image rule can be applied. CASE 9-3 REED V. EZELLE INVESTMENT PROPERTIES, INC., United States District Court for the District of Oregon 353 F. Supp. 3d 1025 (D. Or. 2018) FACTS: Aaron Reed, a photographer, was in a dispute with Ezelle Investment Properties, Inc. over Ezelle’s allegedly using one of Reed's photographs without permission. Reed sent Ezelle a cease-and-desist letter along with a proposed settlement agreement that gave Ezelle the option of immediately settling for $5,000. The settlement agreement contained, among other things, a confidentiality clause. After negotiations, the parties agreed to the amount of $1,000. Ezelle sent Reed a check for $1,000, along with a signed settlement agreement with the confidentiality clause crossed out. Reed accepted the payment but told Ezelle that the confidentiality clause was nonnegotiable. Reed then demanded $20,000 to settle the case. Shortly thereafter, Reed filed suit. Ezelle moved for summary judgment, arguing that the settlement agreement precluded Reed's suit.. ISSUE: Can there be a valid contract if the terms of an acceptance change any of the terms of the offer? REASONING: There is no binding settlement agreement in this case because

Ezelle’s purported acceptance modified a material term of the offer and thus constituted a counteroffer. Reed’s first email to Ezelle was a copy of the Proposed Settlement Agreement, which contained the confidentiality clause at issue. The parties negotiated the settlement amount for the next several weeks. Ezelle proposed a settlement amount of $1,000, and Reed sent Ezelle another copy of the Proposed Settlement Agreement containing the confidentiality clause to be signed and returned with payment of $1,000. Ezelle mailed a $1,000 check to Reed with a signed copy of the Proposed Settlement Agreement, but with the confidentiality provision crossed out. Under the mirror image rule, Ezelle’s tender, which included the deletion of the confidentiality clause, constituted a rejection of Reed’s offer and a counteroffer that Reed was then free to accept or reject. Because Reed did not accept this counteroffer, the parties did not enter into a binding settlement agreement as a matter of law. DECISION: Because there was no acceptance of Ezelle’s counteroffer, there was no contract, and plaintiff Reed’s lawsuit was allowed to continue. SIGNIFICANCE OF THE CASE: This case illustrates how important the mirror image rule is because not understanding how this rule applies can lead parties to think they have a contract when they do not have one. CRITICAL THINKING Can you think of any additional information that could have changed the outcome of this case if the defendant could have provided it? ETHICAL DECISION MAKING If each party had been thinking about the universalization test when taking the actions that led to this litigation, do you think either of them would have behaved differently? Why or why not? GLOBAL Context Digital Archive Japan/Alamy Stock Photo Contracts in Japan The Japanese tend to view contracts as ongoing relationships in which the parties work with each other to smooth out any problems that arise in performance of the contract. The Japanese tend to be suspicious of long, detailed contracts. They have a distinct preference for short, flexible contracts that leave a number of terms to be decided later. When negotiating a contract with a Japanese businessperson, an American businessperson must recognize how the Japanese will interpret his attempts to include more details in the agreement. The American should think about which details are essential for inclusion. Page 212 The mirror-image rule has caused a significant amount of trouble for businesses because often a buyer would make an offer on one form that contained not only the essential terms of the contract but also a number of additional, somewhat minor terms. Generally, the offer was on a standard form that had a place where the essential terms were written in. The seller would often return his standard form with its preprinted terms, along with the essential terms written in to match the terms of the offer. The problem was

that because these preprinted forms did not match, there was legally no contract. If both parties performed their contracts, no problems arose; but the fact that there was no contract meant that on occasion one party could decide simply to not perform, leaving the other party with no remedy. Or, if the parties did perform, the buyer might perform according to the terms on the buyer's form and be sued for breach by the seller, who believed that the terms on the seller's form were the terms of the agreement. To eliminate this problem of the battle of the forms, UCC Section 2-207 significantly modified the mirror-image rule by providing that, as a general rule, an offeree may include in the acceptance terms that are additional to or different from the terms of the offer as long as (1) the offeror did not explicitly state in the offer that all terms of the offer must be accepted exactly as proposed; (2) the offeror does not promptly reject the new terms on receipt of the acceptance; and (3) the new terms do not materially change the terms of the original offer. In the case of additional terms—terms related to issues not addressed in the original offer—if none of the foregoing conditions occur, a contract is formed and the terms of the agreement are those of the acceptance, as long as the parties are merchants. If the parties are not merchants, the additional terms are merely proposals for additions to the contract and must be accepted by the offeror. Page 213 If the terms of the acceptance are different from those in the offer, various states treat the terms differently. In most states, the terms are said to cancel each other out, and the courts then look to the UCC for neutral terms to insert into the contract. Communication to the Offeror An offeror has the power to control the means by which the acceptance is communicated, and if the offeror specifies that only a certain means of communication will be accepted, then only that method of communication forms a valid offer. Suppose, for example, that Jennifer offers to paint Bill's car for $500 but says that he must accept the offer by telephone before midnight on Thursday. If he sends her an email Thursday morning accepting her offer, there is no valid contract. Even though email might be a valid means of accepting a contract offer if no means is specified, when the offer is limited to a specific means of communicating the acceptance, only that means results in a valid contract. Thus Bill's attempted acceptance was simply a new offer. If no means of communicating the acceptance is specified, any reasonable means is generally acceptable. Telephone, telegraph, mail, fax, and email are all valid means of accepting an offer. If a person drafting an offer wants acceptance to be only by a particular means, the offer must make it clear that only a certain means is allowed. The Mailbox Rule Because not all acceptances are made in person, a rule needed to be developed to determine the point at which an acceptance made

through the mail became effective. The courts settled on the mailbox rule, which provides that an acceptance is valid when it is placed in the mailbox, whereas a revocation is effective only when received by the offeree. Today, the mailbox rule has been expanded to apply to faxes in some jurisdictions, with courts holding that once the fax has been transmitted, the acceptance is effective. It is likewise applied to email transmissions in that once the acceptance is sent, it is considered accepted. E-Commerce and the Law Disclosure of Definite and Certain Terms Many people would like to know what sort of terms they will be held to when buying a product. Unfortunately, many people who aren't aware of the importance of receiving prior disclosures also don't realize that online businesses commonly refrain from giving full disclosure of terms about a product until the payment information has already been given. If e-businesses do happen to provide these certain terms before a customer agrees to buy a product, the link to the terms themselves may be hard to find. Another aspect of the terms (if given) is that the language in which the contract is written is dense legal language, which may be hard for the ordinary person to understand fully. These e-business practices in regard to disclosure of terms can be very deceptive. A customer may inadvertently agree to a contract when he or she is given only some information about it. This situation would be as if a student were given a page of text that appeared to be whole and complete, and the student had completed an entire report on the text before being given an additional 50 pages that were also part of the text. Those customers who shop online should be aware of the potential for deception with online sellers and should use caution when making purchases. The Effect of an Acceptance after a Rejection As previously stated, if an acceptance is received after a rejection is received, the acceptance is not valid because the rejection terminated the offer. However, sometimes a rejection is dispatched, but before it is received, the acceptance is communicated to the offeror. In that case, a valid contract has been formed because the rejection is not effective until it is received. Suppose Brenda emails an offer to Harry, and he puts a rejection in the mail. Then, before the rejection is received, Harry calls Brenda and tells her he accepts. A valid contract has been formed, and the rejection will have no effect when it is received. However, if the telephone call had been made after Brenda had received the rejection, there would have been no contract. Page 214 E-Commerce and the Law Who Signed the Contract? When the pandemic swept through the world in 2020, countries around the globe mandated masks, nonessential store closures, and social distancing. Although Electronic Signature use was gaining prevalence before the pandemic, the stay-at-home and social distancing measures caused their use

to skyrocket. Valid contracts must have both an offer and an acceptance. The agreement can be made through oral or written communication—including eSignatures. Companies like DocuSign tout the reliability and security of eSignatures over wet-ink signatures. For example, every DocuSign eSignature has an audit trail with a timestamped history of every viewing, printing, sending, signing, or declining activity. Still, eSignature has run into problems. In Fabian v. Renovate America, Inc., Renovate America contracted with Ms. Fabian to install a solar energy system in her home. However, Ms. Fabian maintained that she had never agreed with Renovate. Renovate argued that Ms. Fabian electronically signed the agreement and produced a 15-digit alphanumeric DocuSign eSignature purportedly signed by Ms. Fabian. Despite the DocuSign audit trail, the court held Renovate could not prove it was Ms. Fabian that put the electronic signature on the agreement. In another case, Banc of America Services sued IO Moonwalkers, Inc., because of a dispute over chargebacks. Moonwalkers claimed it had never electronically signed the contract even though Banc of American could supply DocuSign records. Moonwalkers contended that even though DocuSign data showed someone using a Moonwalkers company email viewed and signed the agreement, the signer was not authorized; Moonwalkers should be off the hook. Ultimately, the court held that the audit trail, together with Moonwalker's other actions following the contract terms, showed that Moonwalkers had agreed to the contract. Sources: Electronic Signatures: Not So Fast (americanbar.org); Using E-Signatures in Court — The Value of an… | Fenwick & West LLP; 7 landmark electronic signature legal cases | ESRA (esignrecords.org.) CASE OPENER W R A P-U P The Problematic Promotion Much to the plaintiff’s dismay, the court in the Pepsi case found that the commercial could not be regarded as sufficiently definite to be an offer, because it specifically reserved the details of the offer to a separate writing, the catalog. Also, the commercial itself made no mention of the steps a potential offeree would be required to take to accept the alleged offer of a Harrier jet. As in most cases where a consumer attempts to place an order for an advertised item, the court regarded the plaintiff’s purported acceptance as an offer. And it was an offer that Pepsi obviously rejected. And, while the court did not specifically mention this factor, common sense should have indicated to the plaintiff and his family that Pepsi did not really intend to give a Harrier jet as one of the promotional prizes. PRACTICAL TIPS for Business Managers When negotiating a contract with another business, be sure to take your time to discuss the nature and expectations of the proposed relationship and to prepare for any problematic contingencies. You could be saving yourself a lot of time and money by making sure that the

contract is complete and clear now instead of fighting about the contract in court later. Remember that contracts do not necessarily have to be in writing to be binding agreements. Whenever discussing an agreement with another party, keep in mind the criteria of an implied contract so you know whether you are agreeing to something that is binding. Lucy v. Zehmer is a classic example of how an offer in jest can still be a reasonable and binding offer. While the authors are not suggesting that you never crack another joke, it is always wise to be careful and deliberate with your words, especially when those words may sound like an offer to a reasonable listener.

SUMMARY The Definition of a Contract Contracts at their simplest level are legally enforceable agreements. A valid contract is generally viewed as one that has the following elements: agreement, consideration, legal object, and parties with legal capacity. Sources of Contract Law There are two sources of contract law: the Uniform Commercial Code and state common law. The Uniform Commercial Code, in Article 2, governs contracts for the sale of goods. All other contracts are governed by the common law. Classification of Contracts Contracts may be classified in a number of ways. Every contract is either unilateral or bilateral; express or implied; valid, voidable, or void; executed or executory; and formal or informal. The Agreement The agreement is the first element of a contract. It begins when one party, the offeror, makes an offer to another party, the offeree. Elements of the Offer A valid offer contains the manifestation of the offeror’s intent to be bound to the definite and certain terms that are communicated to the offeree. Termination of the Offer An offer can be terminated by revocation by the offeror, rejection by the offeree, death or incapacity of the offeror, destruction or subsequent illegality of the subject matter of the offer, or lapse of time or failure of other conditions stated in the offer. Elements of the Acceptance An acceptance is valid when a manifestation of intent to be bound to the terms of the offer is communicated to the offeror by the offeree.

Point/Counterpoint Innovations in blockchain technology, the system by which cryptocurrencies such as Bitcoin operate, have made possible a new type of contract: the smart contract. Smart contracts are contracts written in computer code that automatically executes when a set of conditions is met. For example, say one party wants to rent an apartment from another. They can set up a smart contract that is coded so that when the landlord sends the renter the digital entry key to the apartment, sufficient funds will

automatically be transferred from the renter’s bank account to the landlord. If the key does not arrive, no funds are sent. The contract is encrypted and stored digitally on computers, and the contract’s code cannot be altered by either party without alerting the other. Should the Business World Embrace Smart Contracts? YES NO Smart contracts utilizing blockchain technology have many benefits over traditional contracts and will no doubt be the new standard in only a few years. Perhaps the biggest benefit of smart contracts is that they entirely cut out the middleman. No longer does someone need to draft a physical contract, track down a lawyer or notary, pay to have the contract notarized, and wait for all the paperwork to go through. With a smart contract, the parties simply need to decide on their terms and create a smart contract. The smart contract can contain all the rules, penalties, and terms of a conventional contract, but a smart contract will automatically enforce the obligations. Businesses can save time and money by switching over to smart contracts. Another benefit of smart contracts is that they are secure, both from interference from the contractual parties and from malignant third parties. This means that there’s no possibility for either party to change the contract in bad faith without alerting the other party, effectively nullifying the changes. Arguably, due to the smart contract’s data being kept on a decentralized cloud ledger, smart contracts are more secure from hackers than traditional online transactions where the data is stored on one set of servers owned by a business. A final advantage of smart contracts is that they require accountability of both parties. The smart contract blockchain acts as a ledger that keeps track of all the actions taken by the parties concerning the contract. For example, say a business wants to hire a trucker to ship their products to a buyer. The trucker delivers the product, the delivery is recorded in the blockchain, and the smart contract then transfers the trucker’s fee to his account. Later, the trucker tries to scam the business into paying him twice by claiming that he has not been paid. However, one needs only to look at the blockchain ledger to see that the payment did indeed go through. No trickery or confusion can occur in a smart contract, meaning the chances of breach are far lower and everyone is more likely to get what they want. While great strides in blockchain technology have been made in the last few years, smart contracts simply are not ready to be adopted by the business world quite yet. First of all, while it is true that traditional contracts can contain many complicated clauses and terms, at least they are written in English. Smart contracts are written in code, meaning a business needs to hire a coder or programmer to write smart contracts. But coders are people too, and they can make mistakes. Whereas a traditional contract can be reviewed by the parties for errors, it is

much harder for individuals untrained in a programming language to proofread a contract. This can even be used to gain an unfair advantage if one party can read the code and the other cannot. Another problem with smart contracts is that once they are written and implemented into the blockchain, they are immortal and unchangeable. A smart contract cannot be edited or revoked without writing an entirely new smart contract to override the previous one (and even then, the original smart contract still technically exists). This fact exacerbates any errors made in the “drafting” process of a smart contract, as any submitted errors are unfixable. This fact leads to several issues. First, if a government entity one day decides to regulate smart contracts, existing contracts may have provisions that are made illegal by new legislation (or, perhaps, the entire concept of a smart contract may be made illegal). Second, there is no set of governmental laws in place to make smart contracts legally binding. While the advocates of smart contracts tout that smart contracts are automatically enforceable and therefore either the deal goes through 100 percent or not at all, it seems shortsighted to think that smart contracts will inevitably work out in every circumstance and/or that no one will be wronged by a smart contract. Thus, it is probably unwise for a business to begin using smart contracts without a protective legal framework.

Questions & Problems Explain why the first question a person should ask when getting ready to analyze a contract problem is, “Is this alleged contract a contract for the sale of a good?” What is the difference between an offer for a unilateral contract and an offer for a bilateral contract? Why might that difference be important to understand? What must a party prove to recover under the theory of quasi-contract? What is the mirror-image rule? What is the mailbox rule? In 2014, Julie Gerstenecker, who was married to Adam Gerstenecker, had approximately $78,000 of student loan debt. Hearing Julie lament about the interest on her loans, Adam’s mother, Janice Gerstenecker offered Julie an interest-free loan to pay off her student loan debt in return for monthly payments. In September 2014, Julie sent Janice an email with the details of Julie’s student loan debt. The next day, Janice mailed checks covering the full amount of Julie’s debt to the Department of Education Federal Loan Servicing and Sallie Mae. The agreement was not put into writing. In early 2015, Julie and Adam were going through divorce proceedings. An email exchange between Julie and Adam discussing divorce terms indicated that Julie’s monthly payments to Janice would be reduced from $700 per month to $500 per month. In December 2015, after a year of nonpayments, Janice sued Julie for breach of contract. In the trial, Janice

testified that she had received four checks from Julie before the payments had ceased. Julie testified that she had no recollection or explanation as to why she had sent those checks to Janice. Ultimately, Julie argued that there was no contract between them because “[t]here is no tangible evidence supporting the assertion that Julie intended to agree to pay [Janice] back.” What are the two ways an offeree can manifest intent to enter into the contract? Although there was no explicitly signed contract, what actions by Julie indicate that there was an agreement of the offer? How do you think the court ultimately resolved this case? Source: Gerstenecker v. Gerestenecker, Ala: Supreme Court (2017). Page 217 Timothy Reddick served in a two-year term appointment with the FDIC, with the term lasting from September 2010 to September 2012. In April 2012, prior to the end of the contract, the FDIC offered an extension to Reddick subject to the condition of Reddick’s continued successful performance. Reddick accepted the offer several days after it was made. Unfortunately for Reddick, the FDIC revoked the extension offer in August 2012 due to his failing to meet the condition of continued successful performance by engaging in “highly questionable behavior.” His employment with the agency terminated in September 2012. Reddick subsequently sued the FDIC. Do you think the FDIC was allowed to revoke the offer after Reddick’s acceptance? Explain your reasoning. Source: Reddick v. FDIC, 809 F. 3d 1253 (2016). In August 2014, Superior Structures of Ohio, LLC, and its president, Ryan Villhauer, applied for credit with Willoughby Supply Company, Inc. The application contained a section providing for a personal guarantee, including language that named Villhauer as the guarantor and the statement “This application will not be approved if personal guarantee is not signed.” Directly beneath this section, Villhauer handwrote his name on the “name” line but left the signature line blank. Willoughby Supply granted credit to Villhauer and Superior Structures, and Superior Structures made multiple purchases from Willoughby Supply on this credit. Villhauer and Superior Structures defaulted on the credit and refused to pay Willoughby Supply, resulting in an unpaid balance of $28,832. Willoughby Supply sued Villhauer to collect the debt. Villhauer moved to dismiss the case, arguing that he could not be held liable because he did not sign the personal guarantee. The trial court granted Villhauer’s motion. Did a contract exist between Willoughby Supply and Villhauer? How do you think the appellate court ruled? Source: Willoughby Supply Co. v. Villhauer, 2018-Ohio-2077. In April 2011, Elias Groisman entered into a contract with Shabsi Pfeifer to sell three real properties to Pfeifer on the condition that Pfeifer satisfied two liens on the properties against Groisman’s name and upon payment of $55,000. The email which contained the offer did not have an

end date by which Pfeifer had to complete performance. More than six months later, Groisman entered a contract of sale for the three properties with Maya Development, LLC. In December 2012, Pfeifer filed a complaint against Groisman and Maya Development, seeking specific performance of the contract for the sale of real properties. The trial court dismissed the case, and Pfeifer appealed to the New York Appellate Division Supreme Court. Did Groisman and Pfeifer enter into a valid contract on April 2011? What kind of agreement did both parties have instead? Based on your answers to the previous answers, who won the court case? Why? Source: Shabsi Pfeifer v. Elias A. Groisman, et al., 997 N.Y.S.2d 706 (N.Y. App. Div. 2014). Panther Racing, LLC, is involved in competitive racing, including the development, maintenance, and operation of a racing team in the IndyCar series. Beginning in 2008, the National Guard annually sponsored Panther racing teams in the IndyCar series to advertise itself. According to Panther's CEO, John Barnes, Panther's practice was to prepare for the next racing season before there was a written sponsorship agreement in place. In 2012, the Guard entered a sponsorship contract with Panther. In 2013, Barnes met with LTG Ingram, Director of the Army National Guard; Ingram told Barnes that the Guard's sponsorship of Panther was authorized and fully funded for the 2014 season, thus Panther should not seek other sponsors. During a later phone conversation, Panther was advised that another member of the Guard, Sgt. Kosa, had "full authority to represent the Guard in its communications with Panther regarding the sponsorship. However, an internal Guard memo expressly stated that Sgt. Kosa "was not authorized to award, agree to, or sign any contract modification, or in any way obligate the payment of money by the Government." Sgt. Kosa went on to tell Panther that the Guard authorized renewal sponsorship contract for 2014 and that Panther should prepare for the 2014 season. However, Panther's contract was not extended. By the time it found out, it had already incurred costs while preparing for the 2014 season and did not have time to find another sponsor. Panther sued the Guard for reimbursement of its costs, arguing that Sgt. Kosa had implied authority to bind the government and that there was an implied-in-fact contract in place. Is the contract in effect even though the Guard did not authorize Sgt. Kosa to renew it? How did the court rule? Source: Panther Brands, LLC v. United States, No. 16-1157C (Fed. Cl. 2019). Page 218 Counsel for plaintiff Enedina Trujillo de Paz made a pre-suit offer to State Farm Mutual Automobile Insurance Company (defendant Ana Alberto de Pineda's insurer) to settle damages arising from an auto accident. The offer required that a payment of $25,000 (the policy limits) be "received in [the plaintiff's counsel's] office within 10 days after your written acceptance of this offer to

settle,” and stated that “Timely payment is an essential element and condition of acceptance by either party.” On behalf of the defendant, State Farm made a written acceptance of the offer on July 6, 2018, and arranged for a $25,000 draft to be picked up by United Parcel Service (UPS) and sent to the plaintiff's counsel via overnight delivery. UPS apparently lost that draft, and the plaintiff's counsel did not receive a replacement draft in his office until July 30, 2018, more than 10 days after State Farm's written acceptance. After the plaintiff took the position that the parties had not reached a settlement agreement, the defendant filed a motion to enforce a settlement agreement, arguing that she accepted the settlement offer when she gave the payment to UPS for delivery. The trial court agreed and held that the parties had created an enforceable settlement agreement, concluding that the defendant's counsel “did not commit an error and did everything possible to comply with the terms of the agreement” when he sent the payment by overnight delivery via UPS. Plaintiff appealed on grounds that the terms of her unilateral offer had specified that the payment be received in plaintiff’s counsel’s office within 10 days of the written acceptance of the offer to settle, and since the check had not been received within 10 days, no contract had been formed. How do you think the court of appeals resolved this matter? Why? Source: de Paz v. de Pineda, 361 Ga. App. 293 (2021).